

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

USDA
CALIFORNIA

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In re:

Docket No. AO-F&V-983-2; FV 02-983-01

Pistachios Grown in California;
Recommended Decision and
Opportunity to File Written
Exceptions to Proposed Marketing
Agreement and Order No. 983;
Proposed Rule.

RECEIVED

EXCEPTIONS
FEDERAL MARKETING ORDER FOR
CALIFORNIA PISTACHIOS
(CORRECTED)

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**EXCEPTIONS
FEDERAL MARKETING ORDER FOR
CALIFORNIA PISTACHIOS
(CORRECTED)**

**EXCEPTIONS ON BEHALF OF THE
PROPONENTS COMMITTEE**

The Proponents Committee representing a cross section of the California Pistachio industry, its producers and handlers ("Proponents"), supports the issuance of the Marketing Agreement and Order for Pistachios Grown in California as contained in the Recommended Decision of the United States Secretary of Agriculture (the "Secretary") published in the Federal Register August 4, 2003, at page 45990 et seq., Vol. 68, No. 149 (7 CFR 983) (the "Proposed Order").

This brief is intended as the Proponents response to the opportunity provided to file written exceptions to the Recommended Decision.

The Recommended Decision reflects the Proposed Order published June 28, 2002 in the Federal Register (Vol. 67, No. 123) the record of the public hearing held July 23-25, 2002, in Fresno, California, the amendments offered by the Proponents at the hearing and advocated in their brief dated September 20, 2002, filed in this proceeding and additional changes made in part of the Recommended Decision. The Proponents have certain exceptions that are hereafter explained; otherwise they support the Recommended Decision and the language of the Proposed Order as published in the August 4, 2003, Federal Register.

This brief will comment only on those provisions of the Proposed Order for which the Proponents urge further consideration by the Secretary. The comments will be directed only to those sections to which exception is taken:

**I.
THE DEFINITION OF "ASSESSED WEIGHT" SHOULD MAKE
REFERENCE TO MAXIMUM DEFECTS**

§ 983.6 *Assessed weight*

Assessed weight means pounds of pistachios, with the weight computed at 5 percent moisture, received for processing by a handler within each production year: *Provided*, That for loose kernels, the actual weight shall be multiplied by two to obtain an inshell weight; or based on such other elements as may be recommended by the committee and approved by the Secretary.

Proposed change:

Amend § 983.6 “Assessed weight” to read as follows:

Assessed weight means pounds of inshell pistachios, free of internal defects as defined in § 983.39(b)(4) and (5), with the weight computed at 5 percent moisture, received for processing by a handler within each production year: *Provided*, That for loose kernels, the actual weight shall be multiplied by two to obtain an inshell weight; or based on such other elements as may be recommended by the committee and approved by the Secretary.

Comment:

The definition of “Assessed weight” in § 983.6 of the Proposed Order eliminates the words “edible inshell” which was used in the June 28, 2002, Proposed Order. While the Proponents agree with the change, it leaves the definition unclear as to what standards are to be used in determining “Assessed weight”. The Proponents recommend that this uncertainty be eliminated by incorporating into the definition a reference to § 983.39(b)(4) and (5).

By referring to § 983.39 in the definition of “assessed weight” in § 983.6, the applicable maximum defects allowed by that section are incorporated into “assessed weight”. This reference makes clear that the “assessed weight” is determined after the test for defects is completed. This will make the definition consistent with the determination of the weight of pistachios presently used by handlers to calculate their payments to producers. Since there is no additional requirement that the pistachios also be “edible”, it is appropriate to eliminate that word.

In § 983.53, the “assessed weight of pistachios received by the handler” in each year is used to determine the amount of the pro rata share of the expenses authorized by the Secretary for the operation of the Proposed Order. The only time that this weight is determined is when the pistachios are received by the handler, as explained by Bill Phillimore in his testimony at the hearing. As he pointed out, when received by the handler at the processing plant, the pistachios must be hulled within twenty-four hours to prevent staining of the outer shell; then the nuts are weighed and sampled. He testified “the sampling is used to determine quality and payable weight of the nuts delivered.” (Transcript of Hearing, Day One, July 23, 2002, pages 40-41, Exhibit 8, page 11 and Attachment 8. See also Exhibit 5).

The “payable weight” referred to in the testimony is used as the basis for payment to the producers and is the only available way to determine “assessed weight.” After the pistachios are weighed and sampled, they are commingled with other deliveries.

For purposes of the Proposed Order, it is immaterial whether the pistachios are “edible” when they are received for two reasons. First, under the Proposed Order, the aflatoxin levels apply only when they are shipped under § 983.38(a).

Second, the defects defined in § 983.39(b)(1), (2) and (3) apply only to inshell pistachios. If the inshell pistachios exceed the maximum defects allowed they can be shelled and

then re-tested as kernels to determine whether they exceed the maximum defect levels. For this reason, the assessed weight should be determined by the "inshell pistachios" using the inshell maximum defect levels contained in § 983.39(b)(4) and (5) rather than a determination based on whether the pistachios are "edible" or not. The proviso language in § 986.6 provides the formula for converting loose kernels into inshell weight.

With "edible" deleted from the "assessed weight" definition, it is appropriate to apply the standards of minimum quality used by the handlers to determine the weight on which the producers will be paid which is determined at the time of delivery. These standards are defined in § 983.39(b)(4), "internal (kernel) defects" and § 983.39(b)(5) "Other defects".

For these reasons, it is urged by the Proponents that the definition of "assessed weight" be modified as shown above.

II. THE DEFINITION OF "EDIBLE PISTACHIOS" SHOULD BE DELETED

§ 983.13 **Edible Pistachios**

Edible pistachios are those that do not exceed the level of defects under § 983.38 and § 983.39.

Proposed change:

Delete § 983.13.

Comment:

The Proponents ask that the definition of "edible pistachios" be deleted. The words "edible pistachios" have been deleted from § 983.6 in the Proposed Order and are not referred to in either § 983.38 or § 983.39. Whether pistachios are "edible" is not a factor in determining the minimum levels of aflatoxin in § 983.38 or the minimum quality levels of § 983.39. The definition is not necessary for § 983.38 or § 983.39 or calculating the assessment rate for § 983.53.

III. THE WORD "EDIBLE" SHOULD BE DELETED FROM "LOOSE KERNEL" DEFINITION

§ 983.39 **Minimum quality levels**

§ 983.39(b)(1) *Loose kernels* means edible kernels or kernel portions that are out of the shell and which cannot be considered particles and dust.

Proposed change:

§ 983.39 Minimum quality levels

§ 983.39(b)(1) *Loose kernels* means edible kernels or kernel portions that are out of the shell and which cannot be considered particles and dust.

Comment:

In the Proposed Order, § 983.39(b)(1) uses the word “edible” in relation to “kernels”. However, with the other proposed changes described above, the use of this word, “edible” is no longer necessary, it only creates uncertainty. The “loose kernels” will be subject to the same tolerance for defects as inshell pistachios. The Proponents recommend that the word “edible” be removed from this subsection 983.39(b)(1).

IV.

**THE COMMITTEE SHOULD BE REQUIRED TO
RECOMMEND DISTRICT BOUNDARIES BY SEVEN VOTES**

Without change:

§ 983.11 Districts

(b) With the approval of the Secretary, the boundaries of any district may be changed by the committee, to ensure proper representation. The boundaries need not coincide with county lines. In addition, the boundaries in the production area may be adjusted to conform to changes to the boundaries of the districts established for those of the California Pistachio Commission upon the recommendation of the committee and approval of the Secretary.

Proposed Change:

§ 983.11 Districts

(b) With the approval of the Secretary, the boundaries of any district may be changed to ensure proper representation by the committee, with the vote of at least seven concurring members ~~to ensure proper representation~~. The boundaries need not coincide with county lines. In addition, the boundaries in the production area may be adjusted to conform to changes to the boundaries of the districts established for those of the California Pistachio Commission upon the recommendation of the committee and approval of the Secretary.

Comment:

The Proponents had recommended that a boundary change would require a two-thirds vote before the committee could ask for the Secretary's approval. (Hearing Record, Exhibit 14 at page 15.) This requirement was part of the process by which the industry reached a consensus. Elimination of this requirement could jeopardize the delicate balance of industry support.

As recommended, at least seven concurring votes would be required if the recommended change is not based on the action of the California Pistachio Commission's change in the boundaries. In that case, only a simple majority would be required.

The Proponents urge that the vote of not less than seven concurring votes of the Administrative Committee be required for changes in the boundaries initiated by the Committee and that this policy be explained as seven votes rather than a two-thirds vote as mentioned in the Hearing Record. This makes the language consistent with similar language in other parts of the Proposed Order.

V.
COMMITTEE RECOMMENDATIONS FOR
CHANGES IN AFLATOXIN LEVELS SHOULD BE
BY SEVEN VOTES

§ 983.38 Aflatoxin levels

§ 983.38(b) Change in level.

(b) *Change in level.* The committee may recommend to the Secretary changes in the aflatoxin level specified in this section. If the Secretary finds on the basis of such recommendation or other information that such an adjustment of the aflatoxin level would tend to effectuate the declared policy of the Act, such change shall be made accordingly.

Proposed change:

(b) *Change in level.* By a vote of at least seven concurring votes, the committee may recommend to the Secretary changes in the aflatoxin level specified in this section. If the Secretary finds on the basis of such recommendation or other information that such an adjustment of the aflatoxin level would tend to effectuate the declared policy of the Act, such change shall be made accordingly.

Comment:

Subsection § 983.38(b) authorizes the "committee to recommend to the Secretary changes in the aflatoxin level specified in this section." Later in the order, § 983.46 authorizes the Administrative Committee with a vote "of at least seven concurring members" to recommend changes in the provision contained in § 983.38 through § 983.45 which includes § 983.38(b). However, § 983.46 requires that the change can be requested by the seven or more members of the

Administrative Committee only when it “finds that by reason of changed conditions” the provisions should be modified.

Section 983.38(b) in the Proposed Order does not require either a minimum of seven votes or changed conditions.

The Proponents recommend that at least seven members of the Administrative Committee be required to recommend a change in the aflatoxin level specified in § 983.38(b) so that it is consistent with § 983.46 which requires seven votes to recommend changes for §§ 983.38 through 983.45. The recommendation, however, would continue the authority of the Administrative Committee to make the recommendation without regard to “changed conditions.”

VI. EDITING CHANGES FOR AFLATOXIN TESTING

§ 983.38 Aflatoxin levels

§ 983.38(d)(3) Testing of pistachios

(3) *Testing of pistachios.* Test samples shall be received and logged by an accredited laboratory and each test sample shall be prepared and analyzed using High Pressure Liquid Chromatograph (HPLC) and Vicam Method (Aflatest) or other methods as recommended by not less than seven members of the committee and approved by the Secretary. The aflatoxin level shall be calculated on a kernel weight basis.

Proposed change:

(3) *Testing of pistachios.* Test samples shall be received and logged by an accredited laboratory and each test sample shall be prepared and analyzed using High Pressure Liquid Chromatograph (HPLC), ~~and~~ Vicam Method (Aflatest) or other methods as recommended by not less than seven members of the committee and approved by the Secretary. The aflatoxin level shall be calculated on a kernel weight basis.

Comment:

Subsection § 983.38(d)(3) requires a minor change. Between the words High Pressure Liquid Chromatograph (HPLC) and Viacom Method (Aflatest) the “and” should be deleted and replaced with a coma. These are two separate tests and should not be run together to appear as though it is one test or that both are required.

§ 983.38(d)(4) Certification of lots negative as to aflatoxin.

(4) *Certification of lots “negative” as to aflatoxin.* Lots will be certified as “negative” on the aflatoxin inspection certificate if Test Sample #1 has an aflatoxin level at or below 5 ppb. If the aflatoxin level of Test Sample

#1 is above 25 ppb, the lot fails and the accredited laboratory shall fill out a failed lot notification report as specified in § 983.40. If the aflatoxin level of Test Sample #1 is above 5 ppb and below 25 ppb, the accredited laboratory may at the handler's discretion analyze Test Sample #2 and the test results of Test Samples #1 and #2 will be averaged. Alternatively, the handler may elect to withdraw the lot from testing, rework the lot, and re-submit it for testing after re-working. If the handler directs the laboratory to proceed with the analysis of Test Sample #2, a lot will be certified as negative to aflatoxin and the laboratory shall issue an aflatoxin inspection certificate if the averaged results of Test Samples #1 and Test Sample #2 is at or below 10 ppb. If the averaged aflatoxin level of the Test Samples #1 and #2 is at or above 20 ppb, the lot fails and the accredited laboratory shall fill out a failed lot notification report as specified in § 983.40. If the averaged aflatoxin level of Test Samples #1 and #2 is above 10 ppb and below 20 ppb, the accredited laboratory may, at the handler's discretion, analyze Test Sample #3 and the results of Test Samples #1, #2 and #3 will be averaged. Alternatively, the handler may elect to withdraw the lot from testing, re-work the lot, and re-submit it for testing after re-working. If the handler directs the laboratory to proceed with the analysis of Test Sample #3, a lot will be certified as negative to aflatoxin and the laboratory shall issue an aflatoxin inspection certificate if the averaged results of Test Samples #1, #2 and #3 is at or below 15 ppb. If the averaged aflatoxin results of Test Samples #1, #2 and #3 is above 15 ppb, the lot fails and the accredited laboratory shall fill out a failed lot notification report as specified in § 983.40. The accreditation laboratory shall send a copy of the failed lot notification report to the committee and to the failed lot's owner within 10 working days of any failure described in this section. If the lot is certified as negative as described in this section, the aflatoxin inspection certificate shall certify the lot using a certification form identifying each lot by weight, grade and date. The certification expires for the lot or remainder of the lot after 12 months.

Proposed change:

(4) *Certification of lots "negative" as to aflatoxin.* Lots will be certified as "negative" on the aflatoxin inspection certificate if Test Sample #1 has an aflatoxin level at or below 5 ppb. If the aflatoxin level of Test Sample #1 is above 25 ppb, the lot fails and the accredited laboratory shall fill out a failed lot notification report as specified in § 983.40. If the aflatoxin level of Test Sample #1 is above 5 ppb and below 25 ppb, the accredited laboratory may at the handler's discretion analyze Test Sample #2 and the test results of Test Samples #1 and #2 will be averaged. Alternatively, the handler may elect to withdraw the lot from testing, rework the lot, and re-submit it for testing after re-working. If the handler directs the laboratory to proceed with the analysis of Test Sample #2, a lot will be certified as negative to aflatoxin and the laboratory shall issue an aflatoxin inspection certificate if the averaged results of Test Samples #1 and Test Sample #2 is at or below 10 ppb. If the averaged aflatoxin level of the Test Samples #1 and #2 is at or above 20 ppb, the lot fails and the accredited laboratory shall fill out a failed lot notification report as specified in § 983.40. If the averaged aflatoxin level of Test Samples #1 and #2 is above 10 ppb and below 20 ppb, the accredited laboratory may, at the handler's discretion, analyze Test Sample #3 and the results of Test Samples #1, #2 and #3 will be averaged. Alternatively, the handler may elect to

withdraw the lot from testing, re-work the lot, and re-submit it for testing after re-working. If the handler directs the laboratory to proceed with the analysis of Test Sample #3, a lot will be certified as negative to aflatoxin and the laboratory shall issue an aflatoxin inspection certificate if the averaged results of Test Samples #1, #2 and #3 is at or below 15 ppb. If the averaged aflatoxin results of Test Samples #1, #2 and #3 is above 15 ppb, the lot fails and the accredited laboratory shall fill out a failed lot notification report as specified in § 983.40. The ~~accreditation~~ accredited laboratory shall send a copy of the failed lot notification report to the committee and to the failed lot's owner within 10 working days of any failure described in this section. If the lot is certified as negative as described in this section, the aflatoxin inspection certificate shall certify the lot using a certification form identifying each lot by weight, grade and date. The certification expires for the lot or remainder of the lot after 12 months.

Comment:

In the next to last sentence of § 983.38(d)(4), the word "accreditation" should be changed to "accredited". The next to last sentence should begin: "The accredited laboratory shall . . .". This recommendation is consistent with the definition in § 983.1 for "accredited laboratory."

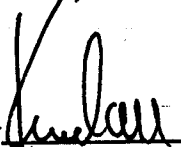
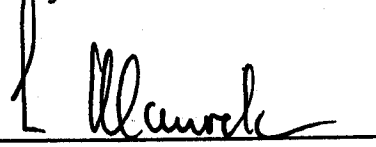
**VII.
CONCLUSION**

With the exceptions and recommendations contained in this Brief, the Proponents urge that the Secretary's Decision and Referendum Order be issued as soon as possible so that the process of putting the proposal in effect with a final rule will be completed before the 2004 crop is harvested.

Dated: September 4, 2003

Respectfully submitted,

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